



Federal Communications Commission
Washington, D.C. 20554

96-45
DOCKET FILED
RECEIVED

JAN - 6 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 5, 1998

Mr. Michael R. Volpe
Assistant General Counsel
General Accounting Office
Washington, DC 20548

Dear Mr. Volpe:

This letter is in response to your letter to Chairman Kennard dated December 23, 1997 regarding the implementation of section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254. Specifically, your letter poses questions concerning the legal authority of the Commission to direct the National Exchange Carrier Association (NECA) to establish a separate subsidiary, the Universal Service Administrative Corporation (USAC), and two unaffiliated corporations, Rural Health Care Corporation (RHCC) and Schools and Libraries Corporation (SLC), to administer the universal service support mechanisms.

We have attempted to answer your questions as completely as possible given the January 5 deadline you provided, the fact that the time deadline overlapped with the holidays and many Commission employees were on leave, and the fact that congressional inquiries addressing similar issues are also pending with strict deadlines. The staff is in the process of collecting information on the additional requests GAO has made beyond those in the December 23 letter and will be responding to those requests more informally.

1. In establishing NECA in the first instance, and then in directing NECA to establish a separate subsidiary and two unaffiliated corporations, the Commission has relied on its authority under section 4(i) of the Communications Act, as amended (47 U.S.C. 154(i)). Please explain how this provision provides authority to establish private corporations without specific statutory direction in view of the Government Corporation Control Act. Would the establishment of these corporations be a delegation of authority to private entities?

Section 4(i) of the Communications Act of 1934, as amended (Act), provides that the Commission may "perform any and all acts, not inconsistent with the Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Courts have consistently held that this provision grants the Commission broad authority to adopt measures that it concludes are necessary to carry out its statutory obligations. The U.S. Court of Appeals for the District of Columbia Circuit, for example, has described the Commission's authority under section 4(i) as "wide ranging." New England Tel. & Tel. v. FCC, 836 F. 2d 1101,

1107 (D.C. Cir. 1987). Courts also have characterized section 4(i) as analogous to Article 1, Section 8, Clause 18 of the Constitution, which authorizes Congress to make all laws that "shall be necessary and proper" for carrying out its enumerated powers and "all other powers" vested in the federal government. Mobile Communications Corp. of America v. FCC, 77 F. 3d 1399, 1404 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81(1996); New England Tel. & Tel., 826 F.2d at 1108; North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985). See also United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).

More relevant to the context of your inquiry, the District of Columbia Circuit upheld the Commission's reliance on section 4(i), *prior to enactment of section 254*, to establish a universal service support mechanism that provided assistance to telephone companies serving areas where the cost of building and maintaining telephone facilities was high. Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1315 (D.C. Cir. 1988). That support mechanism was adopted by the Commission in 1984 and was administered by NECA from the program's inception until it was superseded by the section 254 high cost support mechanism on January 1, 1998. The Court of Appeals expressly concluded that section 4(i) granted the Commission the authority to establish the 1984 universal service support mechanism because the assistance program furthered one of the enumerated purposes of the Act, "mak[ing] available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, . . . wire and radio communication service with adequate facilities at reasonable charges" 47 U.S.C. § 151. Further, the court found that the FCC's establishment of a universal service program "falls within the 'expansive powers' delegated to it by the Communications Act." Id., citing NBC v. United States, 319 U.S. 190, 219 (1943). Moreover, during the more than 10 years that NECA administered that high cost fund, we are not aware of any instances in which Congress, GAO or any others questioned the lawfulness of the fund because of NECA's role in administering the fund.

The 1996 amendments to the Act, among other things, made the Commission's universal service mandate more explicit and extended the reach of universal service support to schools, libraries and rural health care providers. Those amendments, by their terms, do not bar the Commission from assigning administrative functions necessary to fulfill the agency's statutory duties to not-for-profit corporations. Further, we do not read section 254, which sets forth the universal service provisions of the 1996 Act, to limit the Commission's authority under section 4(i) to use NECA or other reasonable administrative mechanisms to assist the agency in carrying out its statutory responsibilities. To the contrary, we believe that section 254 provides an additional, separate basis for the Commission's authority to establish such administrative mechanisms. It bears mention that no party has sought reconsideration of either the Commission's May 8, 1997 Universal Service Order or its July 18, 1997 NECA Governance Order on the grounds that the Commission lacked the legal authority to use NECA or other not-for-profit corporations to administer the universal service support mechanisms mandated by section 254.

Thus we believe that sections 4(i) and 254 of the Act provide broad authority to the Commission to establish specific mechanisms to administer universal service support, including the specific mechanisms at issue. In this particular context, however, the

Commission did not find it necessary to exercise the full extent of that authority. Rather, as discussed below, the Commission considered a formal proposal submitted by NECA regarding administration of universal service. See NECA Governance Order at paras. 8-14. As a predicate to the designation of NECA as temporary administrator, the Commission directed NECA to make certain structural changes.

To place the Commission's action in context, NECA's interest in serving as administrator of the new section 254 universal support mechanisms for schools and libraries and rural health care providers stemmed from its longstanding service as administrator of the existing high cost and low-income support mechanisms. NECA expressed its interest in administering these new mechanisms by submitting a formal proposal to the Commission on January 10, 1997. The Joint Board recommended and the Commission determined in its May 8, 1997 Universal Service Order that NECA would need to make changes to its governance structure to provide significant, meaningful representation for non-incumbent LEC interests. The Commission in the NECA Governance Order determined that NECA's January 10, 1997 proposal, with some modifications, would satisfy the condition established in the Universal Service Order and NECA's appointment as temporary administrator was further conditioned on its and USAC's agreement with the requirements of the NECA Governance Order. Accordingly, the Commission determined that NECA must establish USAC as a separate subsidiary and RHCC and SLC as unaffiliated corporations. NECA assented to these obligations in exchange for serving as the temporary administrator. Had NECA not agreed to establish these entities, the Commission would have been led to reevaluate its decision to designate NECA as the temporary administrator for these universal service support mechanisms.

Under the Government Corporation Control Act, "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. § 9102. In our view, the Commission's actions in the section 254 rulemaking proceeding do not implicate this statutory provision. The Commission did not "establish or acquire" the three not-for-profit corporations. Rather, the Commission conditioned its approval of NECA's request to serve as administrator of the new support mechanisms on NECA's formation of those corporations. Given the fact that the FCC did not "establish" (or "acquire") the corporations, but merely directed NECA to do so as a condition of its being the temporary administrator, that Act is not implicated here. See generally Pearl v. United States, 230 F.2d 243 (10th Cir. 1956). Again, we are unaware of any prior suggestions by Congress or others that NECA's administration of the high cost and rural universal service support mechanisms caused problems under this Act and no pending petitions for reconsideration raise this point.

As to delegation of authority issues, in determining whether an agency has lawfully delegated its responsibilities, courts generally consider whether the agency provided guidelines concerning the scope of activity by the delegated non-agency entities, retained final authority over the decisionmaking, and acted in a manner not inconsistent with its statutory mandate. See, e.g., Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121-22 (1947); Assiniboine and Sioux Tribes v. Board of Oil & Gas Conservation, 792 F.2d 782 (9th Cir. 1986); Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 708, 708 n.5 (D.C.

Cir. 1977); National Ass'n of Psychiatric Treatment Centers for Children v. Mendez, 857 F. Supp. 85, 91 (D.D.C. 1994); United States v. Matherson, 367 F. Supp. 779, 782 (E.D.N.Y. 1973), aff'd mem., 493 F.2d 1399 (2d Cir. 1974). The Commission's use of NECA and the other corporations to assist it in implementation of universal service clearly meets these standards. Specifically the Commission's various orders in the section 254 rulemaking proceeding together with the rules that were adopted to implement those orders provided clear guidance to NECA, USAC, SLC and RHCC concerning their administration of the universal service support mechanisms. See generally Universal Service Order; NECA Governance Order. The rules implementing section 254 are to be codified in 47 C.F.R. Parts 36, 54, and 69. The Commission also maintained ultimate authority over the operation of the support mechanisms. Parties that object to any action taken by NECA or the other corporations can bring the matter to the Commission's attention and request remedial relief. See, e.g., Florida Public Service Commission Request for Interpretation of the Applicability of the Limit on Change in Interstate Allocation, Section 36.154(f) of the Commission's Rules, 12 FCC Rcd 3406 at para. 26 (1997). Finally, as discussed above, there is nothing in the Communications Act prohibiting the FCC from using the assistance of NECA and the corporations for universal service administration; to the contrary, such action is within the scope of the Commission's authority under sections 4(i) and 254 of the Communications Act. Here, too, subsequent to the Rural Telephone Coalition case, we are aware of no questions from Congress or others suggesting that NECA's administration of the high cost and rural universal service support mechanisms constitutes an unlawful delegation and no similar arguments have been raised in pending petitions for reconsideration of the Commission's recent decisions.

2. Are NECA, its newly formed subsidiary, or the two unaffiliated corporations, subject to the Federal Advisory Committee Act (FACA)? Would the selection of the Board members be subject to FACA? Please explain.

The Federal Advisory Committee Act, 5 U.S.C. App. 2 §§1-15, was enacted to control the establishment of advisory committees to the federal government and to allow the public to monitor their existence, activities, and cost. The term "advisory committee" is defined as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup . . . , which is--

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the president or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 2 § 3(2).

FACA does not apply to NECA, its subsidiary or the two unaffiliated corporations because these entities have not been formed to advise the Commission on any matter. Instead, these organizations are providing assistance to the Commission in the implementation of the administration of the universal service support mechanisms, as NECA has done for more than a decade. In this regard, they perform an operational rather than advisory role and are thus not subject to the FACA. See Judicial Watch, Inc. v. Clinton, 76 F.3d 1232 (D.C. Cir. 1996). In that case, the Court of Appeals rejected a claim that a trust formed by President and Mrs. Clinton to manage their legal fees was subject to the FACA. The court held that

the trust was not an advisory committee subject to FACA because the Trust's main purpose "appear[ed] to be the collecting and managing of funds". Id. at 1233; see also (Natural Resources Defense Council v. Environmental Protection Agency, 806 F. Supp. 275, 277 (D.D.C. 1992) (Governor's forum need not be open to the public where Governors were not merely advisory, but acted operationally as independent chief executives in partnership with the EPA); HLI Lordship Industries, Inc. v. Committee For Purchase From The Blind & Other Severely Handicapped, 615 F. Supp. 970, 978 (E.D. Va. 1985) (FACA inapplicable to committee whose advisory capacity is secondary to its operational activities), revised on other grounds, 791 F. 2d 1136 (4th Cir. 1986); 41 C.F.R. § 101-6.1004(g) (General Services Administration (GSA) regulations implementing FACA provide that FACA is inapplicable to entities "established to perform primarily operational as opposed to advisory functions")).

As to the process for selecting members of the Boards of USAC, RHCC and SLC, while the Commission sought input from the public on candidates for the Boards, no committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup was asked for overall consensus advice or recommendations. FACA does not apply to agency solicitation of the views of individual persons. See, e.g., 41 C.F.R. § 101-6.1004(i) (GSA regulations provide that when a meeting with several individuals is convened for the purpose of obtaining advice from the individuals and not consensus advice or recommendations from the group, then the meeting is not subject to FACA).

3. Does NECA, its newly formed subsidiary, or the two unaffiliated corporations provide any budget information to Congress? If not, how is Congress informed of the operations of these entities?

USAC, SLC, and RHCC are independent of each other, and, like NECA, are independent from the Commission and Congress. USAC is an independent subsidiary of NECA. SLC and RHCC are unaffiliated with NECA. Each of the corporations is subject to all statutes applicable to private corporations and to Commission rules, and is authorized only to implement the universal service support mechanisms pursuant to, and in accordance with, the Commission's rules. SLC and RHCC are directly accountable to the Commission for the sound administration of their respective universal service support mechanisms, rather than being accountable through NECA or some other parent organization. Each corporation must determine the best manner in which to process applications efficiently, consistent with sound management practices. Because they are not government agencies or government corporations, and are not supported by federal funds, the corporations do not provide budget information directly to Congress. The corporations are, however, accountable to the Commission. The Commission, in turn, is accountable to Congress.

The administrative structure under which these entities operate includes several safeguards to ensure their accountability. The Commission stated in its NECA Governance Order that an independent auditor must perform an annual audit of each of the three administrative corporations. The audit is intended to ensure that the corporations are properly administering the universal service mechanisms to prevent fraud, waste, and abuse. Before selecting an independent auditor, the corporations must submit to Commission staff preliminary audit

requirements, including the proposed scope of the audit, and the extent of compliance and substantive testing that will be conducted. Commission staff may help to define and modify the scope and focus of these independent audits. In addition, the Commission's rules require USAC, or the permanent Administrator, to submit an annual report to the Commission that includes an itemized list of monthly billing costs. Apart from the mandatory annual audit, the Chairman of the Commission has asked SLC and RHCC each to engage an independent auditor to review their application procedures and controls before disbursing any funds, to guard against waste, fraud, and abuse, and to ensure that there is no unnecessary or inefficient duplication of efforts among the corporations. The Commission also will have ongoing and frequent contact with the representatives of each of the corporations to keep abreast of all relevant aspects of implementation.

In addition, at least 60 days before the start of each quarter, all three corporations must submit to the Commission estimates of support mechanism demand, as well as the corporations' projected administrative expenses for the upcoming quarter, along with the data used to calculate those projected expenses. Administrative costs are currently projected to be well under 1% of the total contributions collected. In addition, USAC must compile total interstate, intrastate, and international end-user telecommunications revenues and submit that information to the Commission to calculate the "contribution factors." The contribution factors are simply the portion of applicable end-user telecommunications revenues that USAC must collect in contributions from each carrier or other provider of interstate telecommunications required by statute or rule to contribute to universal service. The information submitted by USAC, SLC, and RHCC is available for public comment.

4. In the May 1997 Universal Service Order, the Commission determined that the universal service administrator should select a subcontractor to manage the applications process for schools and libraries. In the July 1997 NECA Governance Order, the Commission directed NECA to create an unaffiliated, not-for-profit corporation to manage the application and other processes relating to the administering the schools and libraries program. The Commission further directed NECA to create another unaffiliated, not-for-profit corporation to manage specified portions of the rural health care program. Please explain the new information and analysis that led to this change in the Commission's approach. Please include the names of the corporation and governance experts that the Commission spoke with and their views, the structural organizations that the Commission examined, and the analysis that led to the Commission's decision.

The basis for the Commission's decision to direct the establishment of the Schools and Libraries Corporation and the Rural Health Care Corporation is set forth in the July 18 NECA Governance Order. The NECA Governance Order also identifies other corporate structures that it considered and rejected. The Commission stated in that decision, for example, that the establishment of the corporations will provide the expertise necessary "to ensure that the programs are administered efficiently and in the best interests of their intended beneficiaries." NECA Governance Order at para. 2. The Commission also found that, to ensure continuity and efficient administration, the Schools and Libraries Corporation and the Rural Health Care Corporation "should continue to perform their designated functions even

after the date on which the permanent administrator is appointed." NECA Governance Order at para. 2. Although the justification set forth in the NECA Governance Order is complete, the following paragraphs further summarize the reasons the Commission directed the establishment of Schools and Libraries Corporation and Rural Health Care Corporation to administer, respectively, the schools and libraries and the rural health care support mechanisms.

Each of these support mechanisms has a different focus, is designed for different beneficiaries, and will provide support for different services. The board of directors of each corporation includes representatives from entities that have expertise concerning the intended beneficiaries of the particular support mechanism being administered. For example, the SLC board includes representatives from school and library organizations, as well as a telecommunications industry representative. More than 120,000 schools and libraries are eligible for benefits under the schools and libraries support mechanism. In order to be responsive and accessible to these schools and libraries, it is important that persons administering the schools and libraries support mechanisms understand the specific needs and operational practices of educational institutions. For example, SLC will be responsible for reviewing schools' technology plans in certain instances, and will administer the programs with respect to private, parochial, and public schools. A significant role of the SLC and the RHCC is to ensure that potential service providers and potential beneficiaries are fully apprised of their opportunities and obligations pursuant to the new universal service support mechanisms. The Commission concluded that NECA does not have expertise in the operation of these new support mechanisms, and has no specialized knowledge of educational institutions, library support, or the health care industry, and would likewise have had to assemble staff or contractors to carry out these functions. On the other hand, NECA has experience administering the high cost and low income support mechanisms. The USAC, as a subsidiary of NECA, will take advantage of that experience.

In addition, the Commission accepted the Federal-State Joint Board's recommendation that NECA or an affiliate of NECA be named as temporary administrator. The Commission concluded, however, that it would be better to provide permanence and certainty with respect to the administration of universal service support, to the extent possible. If the schools and libraries and the rural health care mechanisms were administered by or affiliated with NECA or USAC, they would not serve in a permanent capacity unless USAC ultimately were selected as the permanent administrator. Requiring a temporary administrator to build the expertise necessary to run these support mechanisms, and then to rebuild that expertise in a permanent administrator, would have been unduly disruptive and wasteful.

Although there are clear substantive differences among each of the universal service support mechanisms, many of the procedural aspects of administration are common to each of these. Consequently, the Commission required the three corporations to work cooperatively to avoid unnecessary duplication of functions, systems, and resources and they appear to be coordinating their efforts where it is efficient to do so. The majority of the members of the boards of directors for SLC and RHCC also serve on the USAC board of directors. This was intended to ensure close coordination of both administrative and substantive obligations of the three corporations.

We are unable to identify at this point all of the corporate experts who may have been contacted by various FCC personnel. Among those contacted were Professor Adam Brandenburg of the Harvard Business School, and Eric Stern, an attorney with a private law firm. I understand that these individuals provided some very general advice about corporate governance issues and universal service administration.

5. Section 254 required that the Commission initiate a single proceeding to implement the Joint Board's recommendations and to complete this proceeding within 15 months after the date of enactment of the Telecommunications Act of 1996. In view of this requirement, what is the authority of the Commission to (1) establish a new organizational structure for the provision of universal service and (2) to change the mandate of the permanent administrator in connection with the administration of the schools and libraries and rural health care programs. Did the public have an opportunity to comment on these changes? Please explain.

The Commission complied with its statutory obligation to complete a proceeding by May 8, 1997 -- 15 months from the date of enactment of the Telecommunications Act -- that establishes rules that "include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation," as required by section 254(a)(2). In contrast to 47 U.S.C. § 276(b) (regarding provision of payphone service) and 47 U.S.C. § 573(b) (regarding establishment of open video systems), section 254 did not require the Commission to complete all regulatory action, including any reconsideration, within that 15 month time period. The Commission issues reconsideration orders in the ordinary course of its functions. 47 U.S.C. § 405 expressly provides for such reconsideration. The Commission's rules also provide for reconsideration. *See, e.g.*, 47 C.F.R. §§ 1.106, 1.429. Moreover, our rules permit the Commission to reconsider, on its own motion, any Commission action within 30 days after publication in the Federal Register. 47 C.F.R. § 1.108. The NECA Governance Order was adopted 30 days after Federal Register publication of the May 8 order.

In addition, the NECA Governance Order was issued pursuant to a separate docket that addressed issues regarding the administration of the new universal service support mechanisms. As set forth in the NECA Governance Order (*see, e.g.*, para. 9), the Commission issued a Notice of Proposed Rulemaking and Notice of Inquiry seeking comment on NECA's proposal regarding, among other things, the composition of the entity or entities that would administer universal service. Thus there was opportunity to comment on administrative issues generally, and on a specific proposal by NECA to create a separate subsidiary to administer universal service support. A list of commenting parties is attached as Appendix A to the NECA Governance Order.

6. Does NECA, its subsidiary, or the two unaffiliated corporations have authority to operate outside of the Commission's orders? In other words, do these entities have the authority to operate independent from the direction and control of the Commission?

Section 69.603(a) of the Commission's rules precludes NECA from engaging in "any activity

that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues . . . unless such activity is authorized by order of the Commission." 47 C.F.R. § 69.603(a). In the past, the Commission has acted at the request of NECA to allow NECA to engage in different activities. Attached is a Common Carrier Bureau order that was released March 17, 1997 that summarizes the activities for which NECA has received approval. The order also approves, subject to certain conditions, additional activities for which NECA had requested permission. As described in the order, NECA is subject to various safeguards such as the Commission's Part 64 cost allocation rules and cost allocation manual filing requirements to protect against improper cost allocations.

The authorized functions for USAC, RHCC, and SLC are found respectively in Sections 69.616, 69.618, and 69.619 of the Commission's rules, copies of which are enclosed. These sections do not have the express prohibition found in section 69.603(a); however, these sections, particularly with respect to RHCC and SLC, are fairly descriptive of the functions the Commission has prescribed for these corporations as a condition of their participation in the administration of universal service support mechanisms. In addition, the corporations submitted to the Commission for its approval their articles of incorporation, by-laws, and other incorporation documents. As a result, the Commission does not envision USAC, RHCC, or SLC operating outside the scope of the activities set forth in the Commission's orders.

7. What will the Commission's relationship be with the permanent administrator? For example, will it be under contract? What is the status of the establishment of the FACA committee?

On August 1, 1997, the Commission's Common Carrier Bureau released a Public Notice (DA Number 97-1649) requesting nominations by August 22, 1997 for membership on the universal service administrator's Advisory Committee (which is subject to FACA). The public notice states that the Advisory Committee will include representatives from the telecommunications industry, the states, and consumers to ensure that the Committee is impartial and well-balanced. The Commission has not yet named members of the Advisory Committee. The Advisory Committee will recommend a permanent administrator of the universal service support mechanisms.

Because the permanent administrator has not yet been selected, the relationship between the Commission and the permanent administrator has not yet been defined. In the past, however, the Commission has not established a contractual relationship with administrators.

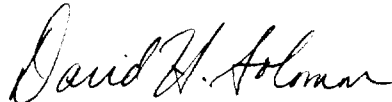
Please provide us with all analysis and information pertaining to the Commission's determination to direct NECA to establish a subsidiary and two unaffiliated corporations. This would include the Commission's May and July orders; any internal memoranda; and any other pertinent information. Additionally, please provide us with any analysis and information that led to the creation of NECA in 1983.

Given the breadth of your request, pending congressional inquiries on similar matters with

tight deadlines, the fact that many relevant staff people were unavailable because of the holidays, and the fact that certain requested documents are more than a decade old and would take time to locate at offsite storage facilities, we have focused our efforts at this point on responding to your specific questions, set forth above. My understanding is that you have already been provided with copies of the Commission's order in which NECA was established in 1983, as well as the May and July, 1997 universal service orders. The Commission's analysis of the various universal service issues is, of course, reflected in those documents. With respect to comments that have been filed regarding administration of universal service support mechanisms and, more generally, the historical role of NECA, we have provided your staff with several letters filed by NECA and the comments and reply comments NECA filed in the NECA Governance proceeding. We have also been asked informally by your staff to provide the comments of the Department of Justice and Rochester Telephone Company in the 1983 proceeding. We have requested these comments from offsite storage but have not yet been successful in retrieving these 15-year old comments.

I hope this information proves responsive. Please contact me if you require any further information.

Sincerely,

A handwritten signature in cursive script, reading "David H. Solomon".

David H. Solomon
Deputy General Counsel

of a High Cost and Low Income Committee with the power and authority to bind the independent subsidiary's Board of Directors on issues relating to the administration of the high cost and low-income support mechanisms, as specifically delineated in the independent subsidiary's bylaws. The High Cost and Low-Income Committee will consist of ten members: the seven service provider representatives (i.e., the representatives listed in § 69.614(b)(1)-(4)) and the low-income, state consumer advocate, and state telecommunications regulator representatives. In the event that a majority of the members of the Committee is unable to reach a decision, the Chairman of the Committee is authorized to cast an additional vote to resolve the deadlock.

§ 69.616 Independent subsidiary functions.

(a) The independent subsidiary shall be solely responsible for administering the universal service support mechanisms for high-cost areas and low-income consumers, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds. The independent subsidiary also shall be required to perform any other duties of the Administrator that relate to the billing, collection, and disbursement of funds that are specified elsewhere in the Commission's universal service rules.

(b) With respect to the universal service support mechanisms for schools, libraries, and rural health care providers, the independent subsidiary shall be responsible for billing contributors to the universal service support mechanisms, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds within 20 days following receipt of authorization to disburse such funds from the Schools and Libraries Corporation and Rural Health Care Corporation.

(c) The independent subsidiary may advocate positions before the Commission and its staff only on administrative matters relating to the universal service support mechanisms.

(d) The independent subsidiary shall maintain books of account separate from those of the association. The independent subsidiary's books of account shall be maintained in accordance with generally accepted accounting principles. The independent subsidiary may borrow start-up funds from NECA. Such funds may not be drawn from the Telecommunications Relay Services (TRS) fund or TRS administrative expense accounts.

§ 69.617 Schools and Libraries Corporation and Rural Health Care Corporation.

(a) *Schools and Libraries and Rural Health Care Corporations.* The association shall incorporate two unaffiliated corporations. The two corporations shall be not-for-profit, non-stock corporations incorporated in the state of Delaware. The corporations shall be designated the Schools and Libraries Corporation and the Rural Health Care Corporation. After incorporating the Schools and Libraries Corporation and the Rural Health Care Corporation, the association shall take such steps as are necessary to make the Corporations independent of.

and unaffiliated with, the association and independent subsidiary. The association shall submit to the Commission for approval the proposed articles of incorporation, bylaws, and any documents necessary to incorporate the Schools and Libraries Corporation and Rural Health Care Corporation by August 1, 1997. The Schools and Libraries Corporation and Rural Health Care Corporation should continue to perform their designated functions, as described in §§ 69.618 and 69.619, after the date on which the permanent Administrator is elected and commences operations.

(b) *Schools and Libraries Corporation's Board of Directors.* The Board of Directors of the Schools and Libraries Corporation shall consist of seven directors and will be composed as follows:

(1) The three directors representing eligible schools on the independent subsidiary's Board of Directors also shall serve on the Board of Directors of the Schools and Libraries Corporation;

(2) The director representing eligible libraries on the independent subsidiary's Board of Directors also shall serve on the Board of Directors of the Schools and Libraries Corporation.

(3) One director representing one of the categories of telecommunications service providers on the independent subsidiary's Board of Directors also shall serve on the Schools and Libraries Corporation's Board of Directors. The independent subsidiary's Board of Directors shall select the telecommunications service provider representative who will serve on the Schools and Libraries Corporation's Board of Directors within seven calendar days of the first meeting of the independent subsidiary's Board of Directors;

(4) One independent director who does not represent schools, libraries, or service providers shall be selected by the Chairman of the Federal Communications Commission to serve on the Schools and Libraries Corporation's Board of Directors. The Chairman of the Federal Communications Commission will select such an independent director simultaneously with selection of the independent subsidiary's Board members.

(5) The directors representing schools, libraries, and service providers and the independent director on the Schools and Libraries Corporation's Board of Directors shall submit to the Chairman of the Federal Communications Commission a candidate to serve as the Chief Executive Officer (CEO) of the Schools and Libraries Corporation. The chosen CEO shall serve on the Schools and Libraries Corporation's Board of Directors.

(c) *Rural Health Care Corporation's Board of Directors.* The Board of Directors of the Rural Health Care Corporation shall consist of five directors and will be composed as follows:

(1) The director representing rural health care providers on the independent

subsidiary's Board of Directors also shall serve on the Rural Health Care Corporation's Board of Directors;

(2) An additional director representing rural health care providers also shall serve on the Rural Health Care Corporation's Board of Directors. Interested parties shall submit nominations for the additional director representing rural health care providers simultaneously with submitting nominations for the independent subsidiary's Board of Directors, as described in § 69.614(c). The Chairman of the Federal Communications Commission will select the additional rural health care provider representative simultaneously with the selection of the members of the independent subsidiary's Board of Directors.

(3) One director representing one of the categories of telecommunications service providers on the independent subsidiary's Board of Directors also shall serve on the Rural Health Care Corporation's Board of Directors. The independent subsidiary's Board of Directors shall select the telecommunications service provider representative who will serve on the Rural Health Care Corporation's Board within seven calendar days of the first meeting of the independent subsidiary's Board of Directors;

(4) One independent director who does not represent rural health care providers or service providers shall be selected by the Chairman of the Federal Communications Commission to serve on the Rural Health Care Corporation's Board of Directors. The Chairman will select, simultaneously with selection of the independent subsidiary's Board of Directors, the independent director to serve on the Rural Health Care Corporation's Board of Directors;

(5) The directors representing rural health care providers and service providers and the independent director on the Rural Health Care Corporation's Board of Directors shall submit to the Chairman of the Federal Communications Commission a candidate to serve as the chief executive officer (CEO) of the Rural Health Care Corporation. The chosen CEO shall serve on the Rural Health Care Corporation's Board of Directors.

(d) All of the Board members of the Schools and Libraries Corporation and Rural Health Care Corporation shall be appointed for two-year terms. Directors may be reappointed for subsequent terms pursuant to the appointment process used initially to select the Corporations' Boards of Directors described in § 69.617 (b) and (c). In the event that a director vacates his or her seat prior to the completion of his or her term, the Corporation will notify the Common Carrier Bureau of such vacancy and a successor will be chosen pursuant to the initial nomination and appointment process described in § 69.617(b) and (c). Removal of members from the Board of the Schools and Libraries Corporation or Rural Health Care Corporation may only occur with the approval of the Chairman of the Federal Communications Commission.

(e) All Board of Directors meetings of the Rural Health Care Corporation and the Schools and Libraries Corporation shall be open to the public and held in Washington, D.C.

(f) Each member of the Board of Directors of the Rural Health Care Corporation and Schools and Libraries Corporation shall be entitled to receive reimbursement for expenses directly incurred as a result of his or her participation on such Board of Directors.

§ 69.618 Rural Health Care Corporation functions.

(a) The Rural Health Care Corporation shall perform the following functions as they relate to the support mechanisms for eligible rural health care providers:

(1) administering the application process for rural health care providers, including the dissemination, processing, and review of applications for service from rural health care providers;

(2) creating and maintaining a website on which applications for services will be posted on behalf of rural health care providers;

(3) performing outreach and public education functions;

(4) reviewing bills for services that are submitted by rural health care providers on which service providers designate the amount of universal service support they should receive for services rendered and on which rural health care providers confirm that they have received such services;

(5) monitoring demand for the purpose of determining when the \$400 million cap has been reached in the case of the rural health care providers program;

(6) submitting to the Commission all quarterly projections of demand and administrative expenses, as described in § 54.709(a)(3);

(7) informing the independent subsidiary, as quickly as possible, but no later than 20 days following the Rural Health Care Corporation's receipt of the bills for services, of the amount of universal service support to be disbursed to service providers;

(8) authorizing the performance of audits of rural health care provider beneficiaries of universal service support; and

(9) any other function relating to the administration of the rural health care program that is not specifically assigned to the independent subsidiary.

(b) The Rural Health Care Corporation shall maintain books of account separate from those of the association, the independent subsidiary, and the Schools and Libraries Corporation. The Rural Health Care Corporation's books of account shall be maintained in accordance with generally accepted accounting principles.

(c) The Rural Health Care Corporation may borrow start-up funds from the association or the independent subsidiary, but such funds may not come from the Telecommunications Relay Services (TRS) fund or TRS administrative expense accounts.

(d) The Rural Health Care Corporation shall make available to whomever the Commission directs, free of charge, any and all intellectual property, including, but not limited to, all records and information generated by or resulting from its role in administering the rural health care program, if its participation in administering the rural health care program ends. The Rural Health Care Corporation must specify any property it proposes to exclude from the foregoing types of property based on the existence of such property prior to the incorporation of the Rural Health Care Corporation.

§ 69.619 Schools and Libraries Corporation functions.

(a) The Schools and Libraries Corporation shall perform the following functions as they relate to the support mechanisms for eligible schools and libraries:

(1) administering the application process for schools and libraries including the dissemination, processing, and review of applications for service from schools and libraries;

(2) creating and maintaining a website on which applications for services will be posted on behalf of schools and libraries;

(3) performing outreach and public education functions;

(4) reviewing bills for services that are submitted by schools and libraries and on which service providers designate the amount of universal service support they should receive for services rendered and on which schools and libraries confirm that they have received such services;

(5) monitoring demand for the purpose of determining when the \$2 billion trigger has been reached in the case of the schools and libraries program;

(6) submitting to the Commission all quarterly projections of demand and administrative expenses, as described in § 54.709(a)(3);

(7) informing the independent subsidiary, as quickly as possible, but no later than 20 days following the Schools and Libraries Corporation's receipt of the bills for services, of the amount of universal service support to be disbursed to service providers;

(8) authorizing the performance of audits of schools and libraries beneficiaries of universal service support; and

(9) any other function relating to the administration of the schools and libraries

programs that is not specifically assigned to the independent subsidiary.

(b) The Schools and Libraries Corporation shall implement the rules of priority in accordance with § 54.507(f).

(c) The Schools and Libraries Corporation may review and certify schools' and libraries' technology plans when a state agency has indicated that it will be unable to review such plans within a reasonable time.

(d) The Schools and Libraries Corporation shall classify schools and libraries as urban or rural and use the discount matrix established in § 54.505(c) to set the discount rate to be applied to services purchased by eligible schools and libraries.

(e) The Schools and Libraries Corporation shall maintain books of account separate from those of the association, the independent subsidiary, and the Rural Health Care Corporation. The Schools and Libraries Corporation's books of account shall be maintained in accordance with generally accepted accounting principles.

(f) The Schools and Libraries Corporation may borrow start-up funds from the association or the independent subsidiary, but such funds may not come from the Telecommunications Relay Services (TRS) fund or TRS administrative expense accounts.

(g) The Schools and Libraries Corporation shall make available to whomever the Commission directs, free of charge, any and all intellectual property, including, but not limited to, all records and information generated by or resulting from its role in administering the schools and libraries program, if its participation in administering the schools and libraries program ends. The Schools and Libraries Corporation must specify any property it proposes to exclude from the foregoing types of property based on the existence of such property prior to the incorporation of the Schools and Libraries Corporation.

§ 69.620 Administrative expenses of independent subsidiary, Schools and Libraries Corporation, and Rural Health Care Corporation.

(a) The annual administrative expenses of the independent subsidiary, Schools and Libraries Corporation, and Rural Health Care Corporation should be commensurate with the administrative expenses of programs of similar size and may include, but are not limited to, salaries of officers and operations personnel, the costs of borrowing funds, equipment costs, operating expenses, directors' expenses, and costs associated with auditing contributors or support recipients.

(b) The independent subsidiary, Schools and Libraries Corporation, and Rural Health Care Corporation shall submit to the Commission projected quarterly budgets at least 60 days prior to the start of every quarter. The Commission must approve the projected quarterly budgets before the independent subsidiary disburses funds for administrative expenses to the

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
National Exchange Carrier)	
Association, Inc.)	AAD 95-135
)	
Request for Authorization to)	
Engage in Additional Activities)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1997

Released: March 17, 1997

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 7, 1995, the National Exchange Carrier Association, Inc. ("NECA" or "the association") requested authorization to engage in four activities beyond those already authorized by the Commission's rules or orders.¹ Specifically, NECA requests authorization: (1) to offer assistance to international entities; (2) to conduct telecommunications-related training; (3) to evaluate the feasibility of providing additional services and activities incidental to core operations; and (4) to provide, through its nonregulated affiliate, Independent NECA Services, Inc. ("INS"), agent and administrative services for marketing the services of local exchange carriers ("LECs") and for advertising the services of third-party vendors through LECs.²

2. In this *Memorandum Opinion and Order*, the Common Carrier Bureau ("the Bureau") grants NECA's requests to engage in the additional activities under certain conditions.

¹ Letter dated Sept. 6, 1995 from Bruce W. Baldwin, NECA President, to William F. Caton, Acting Secretary, Federal Communications Commission, regarding Authorization Requests ("NECA Request").

² Id. at 2.

II. BACKGROUND

3. NECA was established in 1983 as an association of incumbent local exchange carriers ("ILECs") to administer the interstate access tariff and revenue distribution processes.³ NECA currently administers several Commission programs, including the pools for the common line and traffic sensitive elements,⁴ the Universal Service Fund, the Lifeline Assistance program, the Long Term Support program, and the Telecommunications Relay Services program.⁵ Section 69.603(a) of the Commission's rules precludes NECA from engaging in "any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues . . . unless such activity is expressly authorized by order of the Commission."⁶

4. NECA previously has received Commission approval to perform certain activities in addition to those authorized by Section 69.603(a).⁷ Upon the detariffing of billing and collection services in 1986, the Commission authorized NECA to provide nonregulated billing

³ MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 333-34 (1983).

⁴ These pools allow participating ILECs to share the risks of providing interstate services; participants in each pool charge uniform rates based on the pool participants' collective costs and demand that are contained in tariffs that NECA files. The ILECs collect common line ("CL") and traffic sensitive revenue directly from their customers. The participants report this revenue along with their CL and traffic sensitive investment and expenses to NECA, which redistributes the revenue, after paying its own administrative costs, by first reimbursing the participants for their CL and traffic sensitive expenses, and then distributing any residue among the participating ILECs in proportion to their average net investment.

⁵ The Universal Service Fund ("USF"), Lifeline Assistance, Long Term Support, and Telecommunications Relay Services ("TRS") programs share a common purpose of promoting affordable telephone service throughout the nation. The USF helps carriers operating in high cost areas to maintain low intrastate service rates in those areas. See 47 C.F.R. §§ 69.116, 69.603(c). The Lifeline Assistance program helps persons with low incomes to pay for telephone service. See 47 C.F.R. §§ 69.117, 69.603(d). The Long Term Support program requires ILECs that do not participate in the CL pool to contribute part of their revenue to that pool. These contributions permit NECA to maintain a nationwide average CL rate equivalent to the rate that would result if all ILECs had participated in the CL pool. See 47 C.F.R. §§ 69.2(y), 69.612. TRS permits persons with hearing and speech impairments to communicate by telephone with persons who do not have such impairments. TRS facilities have specialized equipment and staff who relay conversations between persons using text telephones and persons who use conventional telephones. Carriers can charge TRS users rates no greater than the rates charged for functionally-equivalent voice communication services. See 47 C.F.R. §§ 64.601-64.605. These programs will be modified as the Commission carries out Congress's mandate to reform existing universal service mechanisms consistent with the pro-competitive, deregulatory objectives of the Telecommunications Act of 1996. See 47 U.S.C. § 254; Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (Nov. 8, 1996).

⁶ 47 C.F.R. §69.603(a).

⁷ Activities not explicitly authorized by 47 C.F.R. § 69.603(a) are hereinafter generally referred to as "additional" activities.

and collection services for those ILECs that did not want, or were unable, to provide these services.⁸ In 1987, the Bureau further authorized NECA to perform specified activities relating to intrastate tariffs and revenue pools on a compensatory basis.⁹ The following year the Bureau granted NECA's request to provide non-ILECs with on-line and magnetic tape access to its Tariff FCC No. 4 ("Tariff No. 4") database.¹⁰ In February 1996, the Bureau further approved NECA's request to include non-NECA member access data in the Tariff No. 4 database.¹¹ NECA's provision of these non-tariffed services is expressly conditioned upon its not recovering any of the costs of these services through interstate tariff charges.¹²

5. As a condition of engaging in the intrastate tariff and revenue pool activities, the Bureau required NECA to submit, and receive approval for, a cost accounting and procedures manual ("CAM") to ensure that NECA would not recover costs of intrastate activities through interstate tariff charges.¹³ The CAM divides NECA's activities into two groups: Category I activities, which consist of NECA's mandated operations,¹⁴ and Category II activities, which

⁸ Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, CC Docket No. 85-88 (1986), recon. 1 FCC Rcd 445 (1986). NECA provides billing and collection through its subsidiary, Independent NECA Services, Inc. ("INS").

⁹ NECA's Request for Authority to Provide Intrastate Services to Exchange Carrier Members, Memorandum Opinion and Order, 2 FCC Rcd 6853 (Com. Car. Bur., 1987) ("Intrastate Services Order").

¹⁰ See National Exchange Carrier Association, Inc., Request for Authorization to Perform Certain Customized Interstate Services, Memorandum Opinion and Order, DA 88-1610, 1988 WL 488223 (Com. Car. Bur. rel. Oct. 14, 1988) ("Interstate Services Order"). The Tariff 4 database contains the vertical and horizontal ("V and H") coordinates for each wire center used by NECA's member ILECs in the United States. Similar to longitude and latitude, the V and H coordinates designate wire center locations that carriers use to determine the distance between two central office locations. Users of the database can determine the length of any access transmission path for purposes of calculating interstate access charges, as well as billing percentages when multiple providers are involved in providing the access services. The Tariff 4 database also contains information on the services available at each wire center, the type of switch for each wire center, and interconnection agreements between ILECs.

¹¹ Request for Authorization to Include Non-Member Data In Access Tariff Database, Memorandum Opinion and Order, 11 FCC Rcd 1141 (Com. Car. Bur. 1996) ("Non-Member Data Order").

¹² See, e.g., Interstate Services Order, DA 88-1610, at para. 9.

¹³ National Exchange Carrier Association, Inc.'s Cost Accounting and Procedures Manual, Memorandum Opinion and Order, 3 FCC Rcd 5827 (Com. Car. Bur. 1988).

¹⁴ Category I activities include: the preparation of access charge tariffs; the collection and distribution of access charge revenues; participation in Commission or court proceedings related to Subpart G of Part 69 of the Commission's Rules; preparation and filing of an access charge tariff containing terms and conditions; and the administration of the Universal Service Fund, Lifeline Assistance charges, the Long Term Support program, and the transitional support fund. NECA's Cost Accounting and Procedures Manual ("CAM"),

consist of all other NECA operations not classified as Category I.¹⁵ NECA voluntarily engages independent auditors on an annual basis to audit its Annual Report of Cost Allocation Results, which applies the methodology in NECA's CAM.

6. On September 10, 1993, NECA requested Commission authorization to expand NECA's training program, to share telecommunications information with foreign countries, and to provide to LECs, through INS, agency and administrative services for such programs as customized marketing packages.¹⁶ Forty-four parties submitted comments on the request in response to a Public Notice issued by the Commission on October 22, 1993.¹⁷ NECA withdrew its request on June 8, 1995; the Bureau's Accounting and Audits Division dismissed the request on June 19, 1995.¹⁸

7. On September 7, 1995, NECA filed the letter addressed in this Order. NECA's current request defines more clearly the three services proposed in 1993. NECA also seeks authorization to perform business evaluations of potential Category II and incidental Category I activities to determine the feasibility of performing additional activities.¹⁹ The Accounting and Audits Division issued a Public Notice on September 25, 1995 inviting public comment.²⁰

Sec. II, p. 1 (9/30/96).

¹⁵ NECA's Category II activities include: the administration of untariffed billing and collection services; the preparation and filing of intrastate tariffs; the establishment and operation of intrastate revenue pools; an audit of intrastate exchange carrier reporting and settlements; the provision of all Tariff No. 4 services to non-exchange carriers; the provision of customized Tariff No. 4 services to exchange carriers; and the inclusion of non-NECA-member data in Tariff No. 4. Id.

¹⁶ Letter dated Sept. 10, 1993 from Bruce W. Baldwin, NECA President, to Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, Federal Communications Commission, regarding Authorization Requests ("NECA 1993 Request").

¹⁷ National Exchange Carrier Association Files Petition for Authorization to Perform Additional Services, Public Notice, 8 FCC Rcd 7580 (1993).

¹⁸ National Exchange Carrier Association, Inc., Public Notice, 10 FCC Rcd 1354 (Acctg. and Aud. Div., 1995).

¹⁹ NECA Request at 2.

²⁰ National Exchange Carrier Association Files Petition for Authorization to Engage in Additional Activities, Public Notice, 10 FCC Rcd 10782 (Acctg. and Aud. Div., 1995). The following 26 commenters filed in response to the Public Notice: AT&T Corporation ("AT&T"), Benton Ridge Telephone Company ("Benton Ridge"), Bledsoe Telephone Cooperative, Inc., Cathey, Hutton & Associates, Inc. ("CHA"), Chesnee Telephone Company, Inc. ("Chesnee"), Community Service Telephone Company ("CST"), Concord Telephone Company ("CTC"), International Finance Corporation ("IFC"), Interstate Telcom Consulting, Inc., ITELCO, John Staurulakis, Inc. ("Staurulakis"), Lorreto Telephone Company, Inc., MCI Corporation ("MCI"), MCT Telecom ("MCT"), Miller, Canfield, Paddock and Stone, P.L.C. ("Miller"), National Telephone Cooperative Association

III. NECA'S REQUEST

8. First, NECA requests authorization to provide assistance to international entities, which may include foreign nations, international corporations, and international organizations. This assistance would consist of providing information and analysis related to telecommunications access charges, tariffs, revenue distribution, universal service, interconnection, and other activities in which NECA has been authorized to engage. NECA would give potential clients written notice that it is a private corporation and is not an arm of the United States government. NECA claims that sharing its expertise would accelerate the opening of foreign markets to competition.²¹

9. Second, NECA requests permission to provide members and non-members of NECA with "telecommunications-related" training on business management and emerging telecommunications technologies. NECA states that the business management training would encompass courses on interviewing and job performance techniques and written and oral presentation skills. Courses on emerging telecommunications technology would focus on such topics as SONET, frame and cell relay, fiber optics, ISDN, and wireless technologies, as well as on associated customer applications and related public policy issues. NECA states that these courses would satisfy a growing industry need.²²

10. Third, NECA seeks express authorization to evaluate potential Category II services and potential activities incidental to Category I operations. An evaluation of potential Category II services may include a business case, market research, and testing. Each evaluation would typically be completed within a one-year period and annual aggregate expenses for all evaluations would not exceed one percent of NECA's annual operating expenses. NECA would also evaluate potential incidental activities that it might want to undertake, examples of which are short-term research projects for "think tanks" studying industry trends and the sale of non-proprietary NECA publications assistance.²³

11. Fourth, NECA requests authorization so that its nonregulated affiliate, INS, can provide additional agent and administrative services to LECs by acting as a centralized point of contact between LECs and third-party vendors for marketing and advertising programs. INS would negotiate with vendors on behalf of groups of LECs to procure marketing strategies and materials customized to sell the services of LECs. INS would also negotiate with vendors

("NTCA"), Nelson Telephone Cooperative, Pennsylvania Telephone Association, Randolph Telephone Membership Corporation, Star Telephone Membership Corporation, Telephone Service Company, United States Agency for International Development ("USAID"), U.S. Intelco Networks, Inc. ("USIN"), and West Virginia Telephone Association. NECA and GVNW Inc./Management ("GVNW") filed reply comments.

²¹ NECA Request at 3.

²² Id.

²³ Id. at 3-4.

seeking to advertise services through LECs using vehicles such as bill inserts, promotional offerings, and phone booths posters. NECA states that these activities would give small LECs access to customized services that are currently unavailable, and would create efficiencies for both ILECs and third-party vendors.²⁴

12. NECA proposes to classify the expenses associated with all of these activities as Category II, with the exception of the expenses associated with the evaluation of potential activities incidental to Category I activities, which it proposes be classified as Category I expenses. NECA would recover the costs of these activities through contracts or specific charges made to entities receiving the services. NECA asserts that if the Commission authorized these additional activities, NECA's fixed costs would be spread over more activities, thereby reducing the level of fixed costs assigned to Category I activities.²⁵

13. Anticipating the concerns of the Commission and commenters, NECA proposes that several restrictions be imposed on each of the requested authorizations, as applicable. First, NECA suggests that the Commission limit all Category II expenses to a fixed percentage of total NECA and INS operating expenses in a calendar year. With current Category II expenses at ten percent of total expenses, NECA argues that a ceiling of 25 percent would allow reasonable growth in Category II activities. Second, NECA proposes that it be prohibited from using proprietary information obtained through Category I operations for Category II activities unless the information's source gives prior written permission and the information is made available to all interested parties on the same terms. Third, NECA proposes to give potential customers for Category II services written disclosure that purchase of the service will not confer an advantage in their Category I dealings with the association.²⁶

IV. COMMENTS

14. The majority of commenters, especially independent ILECs, support NECA's proposal to provide additional services on a compensatory basis. They argue that expansion of NECA's telecommunications-related training will help ILECs prepare for future technological, marketplace, and regulatory developments.²⁷ Several commenters contend that NECA has unique expertise to provide training in these areas.²⁸ Other commenters maintain that NECA can provide

²⁴ Id. at 4-5.

²⁵ Id. at 1-2.

²⁶ Id. at 5.

²⁷ Chesnee Telephone Company Comments at 1; MCT Telecom Comments at 1; Pennsylvania Telephone Association Comments at 1.

²⁸ See, e.g., MCT Telecom Comments at 1; Randolph Telephone Membership Corporation at 1; Star Telephone Membership Corp. Comments at 1.

"unbiased" training²⁹ that is otherwise not readily affordable or available to independent ILECs.³⁰ Several commenters also support NECA's request to provide additional INS-administered programs.³¹ They contend that NECA can offer these services with greater operational and financial efficiencies than the individual independent ILECs.³² In support of NECA's request to provide international assistance, a number of commenters assert that there is a need among international entities for NECA's special expertise.³³ USAID states that NECA has already provided valuable advice in a USAID-funded project, and that further telecommunications assistance will help foster economic growth and democracy in many countries.³⁴

15. Certain commenters give conditional support to NECA's request to engage in additional activities. AT&T asserts that NECA acquired its telecommunications expertise as a result of its role as administrator of the interstate access tariff and revenue distribution processes that are supported by interexchange carriers ("IXCs") through revenues the ILECs derive from the provision of access services to the IXCs.³⁵ AT&T argues that authorization to perform any additional activities should be conditioned upon the contribution of some of the profits from the activities being used to reduce interexchange access charges.³⁶ GVNW conditions its support of NECA's request on Commission-approved accounting safeguards to prevent cross-subsidization of new activities with pool administration revenues.³⁷ GVNW also states that the Commission should prohibit NECA from providing consulting services to individual ILECs and bar NECA's use of proprietary information obtained as a result of its Category I responsibilities because

²⁹ Bledsoe Telephone Cooperative Comments at 1; Chesnee Telephone Company Comments at 1; Loretto Telephone Company Comments at 1.

³⁰ Loretto Telephone Company Comments at 1; Nelson Telephone Company Comments at 1.

³¹ Benton Ridge Comments at 2-3; Telephone Service Company Comments at 3.

³² Id.

³³ IFC Comments at 1; Miller Comments at 1; NTCA Comments at 1-3; USAID Comments at 1.

³⁴ USAID Comments at 1. "NECA has already offered valuable expert advice concerning USAID-funded assistance efforts in Hungary in connection with settlements issues." Id.

³⁵ AT&T Comments at 2.

³⁶ Id. (stating that some of the profits that NECA derives from additional Category II activities should reduce access charges). See also MCI Opposition at 8 (stating that if NECA receives authorization to engage in additional activities, which MCI opposes, all profits that NECA derives from additional activities should reduce access charges).

³⁷ GVNW Reply at 2, 3.

NECA will inevitably have access to this information before its competitors in the consulting services market.³⁸

16. Other commenters, notably MCI and certain consultants, oppose NECA's proposal to provide additional services.³⁹ These commenters contend that Commission approval of NECA's request would create conflicts between NECA's current role as impartial pool administrator and its proposed role as service provider for hire to individual ILECs,⁴⁰ and would increase NECA's incentive to subsidize expenses of additional activities with access charge revenues.⁴¹ Opponents to NECA's request also contend that the Commission's authorization of these additional services would divert resources from NECA's necessary core functions⁴² and permit NECA to operate beyond its traditional areas of expertise.⁴³ These commenters argue that a government-created entity should not compete in the provision of for-profit services already offered by private companies and associations.⁴⁴ Many commenters question who will bear the risk of loss from these competitive offerings.⁴⁵ CHA asserts that NECA's status as a Commission-created administrator of the interstate access tariff and revenue distribution processes gives it an unfair competitive advantage by providing it with credibility, contacts, and access to proprietary information.⁴⁶ CHA argues that unless NECA structurally separates its Category I and II operations, the Commission should allow the association to engage in an additional activity only when it can show that the existing market fails to meet an industry need and that NECA has unique qualifications to address that need.⁴⁷ USIN distinguishes previously authorized activities from those presented in the current request in that the authorized activities relate more closely to NECA's core functions and arguably promote the public interest by facilitating the provision

³⁸ Id. at 4, 5.

³⁹ See, e.g., Itelco Comments at 2; MCI Opposition at 1-2; Staurulakis Comments at 1-2.

⁴⁰ See, e.g., GVNW Reply at 4-5; USIN Comments at 4-5.

⁴¹ MCI Opposition at 4-5.

⁴² See, e.g., MCI Opposition at 2-4 (citing Safeguards to Improve Administration of the Interstate Access Tariff and Revenue Distribution Processes and Consideration of NECA's Incentive Compensation Plan Order, Report and Order and Order to Show Cause, 10 FCC Rcd 6243 (1995)); Staurulakis Comments at 2-6.

⁴³ CHA Comments at 2-4; USIN Comments at 8.

⁴⁴ CHA Comments at 5-8; MCI Opposition at 7; USIN Comments at 6-11.

⁴⁵ CHA Comments at 6-7; GVNW Reply at 2; USIN Comments at 13.

⁴⁶ CHA Comments at 4.

⁴⁷ Id. at 5-8.

of necessary services in an efficient manner.⁴⁸ Staurulakis argues that the Commission should require NECA to show a quantitative analysis of its member companies' need for NECA to provide these services before proceeding with the request.⁴⁹

17. In its reply, NECA argues that its existing and proposed safeguards will ensure that it has no competitive advantage over its competitors.⁵⁰ NECA claims that it actually faces a competitive disadvantage because it must publicly file its business plan each time it requests authorization to provide a new service.⁵¹

V. DISCUSSION

A. Introduction

18. We authorize NECA to engage in the requested activities provided that NECA meets the following criteria: first, costs must not be misallocated between Category I and Category II activities; second, NECA's performance of an activity must have no anti-competitive effect; and third, NECA's performance of the activity must be consistent with the public interest.

19. We decline to impose an additional substantive threshold that NECA must meet to perform future additional activities. In the past, we have authorized NECA to perform additional activities that have been outgrowths of core functions⁵² specifically mandated by the Commission.⁵³ CHA urges that the Commission authorize additional activities only if an "unmet" need exists for which NECA is "uniquely qualified" to provide,⁵⁴ while Staurulakis asks that NECA provide a "quantitative analysis" demonstrating a demand for the requested services.⁵⁵

⁴⁸ USIN Comments at 8.

⁴⁹ Staurulakis Comments at 8.

⁵⁰ NECA Reply at 14-15.

⁵¹ Id.

⁵² See, e.g., Interstate Services Order, DA 88-1610 at para. 7 (granting NECA's request to provide Tariff No. 4 services to non-exchange carriers because the activity complements NECA's maintenance of the database, which is necessary for its tariff activities); Intrastate Services Order, 2 FCC Rcd. at 6853, para 2 (granting authorization to perform certain intrastate activities because of NECA's experience with similar interstate activities).

⁵³ See 47 C.F.R. § 69.603.

⁵⁴ Staurulakis Comments at 8.

⁵⁵ CHA Comments at 5.